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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

LOCAL 222, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD
and CONAIR CORPORATION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MAX ZIMNY
1710 Broadway
New York, New York 10019

SIDNEY REITMAN
JESSE H. STRAUSS
BENNET D. ZUROFSKY
744 Broad Street
Newark, New Jersey 07102

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

Attorneys for Petitioner

Of Counsel:

DAVID SILBERMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether the National Labor Relations Act precludes issuance of a remedial bargaining order, in a "category one" case as defined by this Court in *NLRB v. Gissel Packing Co.*, 395 U.S. 575: *viz*, a case, like the instant one, in which from the inception of an organizing campaign—before the union has an opportunity to secure expressions of support from a majority of the employees in the bargaining unit—the employer commits "outrageous and pervasive unfair labor practices . . . [whose] effects cannot be eliminated by the application of traditional remedies [other than a bargaining order] with the result that a fair and reliable election cannot be had" (*Id.* at 613-614)?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Local 222, International Ladies' Garment Workers' Union, AFL-CIO hereby petitions this Court to issue a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit to review the judgment in *Conair Corporation v. NLRB and ILGWU*, C.A.D.C. No. 82-1623.

OPINIONS BELOW

The decision and order of the National Labor Relations Board is reported at 261 N.L.R.B. No. 178 and is reprinted as Appendix C in a separately bound Appendix to this Petition (hereinafter "App."). The opinion and

judgment of the court of appeals are not yet reported and are reprinted as Appendices A and B.[1]

JURISDICTION

The opinion of the court of appeals was issed on November 15, 1983, and that court's judgment was issued on January 31, 1984. On February 10, 1984, Chief Justice Burger signed an order extending the time for filing a petition for a writ of certiorari to and including March 14, 1984. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c), provides in pertinent part as follows:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that the person named in the complaint has engaged or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act.

STATEMENT OF THE CASE

Statement of Facts

This case arises out of six unfair labor practice charges filed with the National Labor Relations Board ("NLRB") by petitioner Local 222, International Ladies' Garment

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[1] The findings of fact in the Administrative Law Judge's 195 page decision serve only as background to the NLRB's 40 page decision and the court of appeals' 96 page decision, both of which detail the facts. As a result of the extraordinary length of the three decisions taken together, the ALJ's decision is not reprinted in the Appendix. Instead that decision has been photocopied and is being lodged with the Clerk of the Court.

Workers' Union ("ILGWU") against respondent Conair Corporation ("Conair") from April, 1977 to February, 1978. The facts, as found by the labor board and affirmed by the court of appeals, are as follows.

In March, 1977, the ILGWU began a campaign to organize Conair's production and maintenance employees. "Almost immediately thereafter [Conair's] officials embarked upon a course of conduct designed to intimidate and undermine its employees' support for the Union" (App. 119a). Specifically:

> [I]n early April Respondent [Conair] began holding a series of meetings with its employees in large and in small groups. . . . At these meetings and on numerous occasions, Respondent[] [Conair's] executive and lower ranking supervisors threatened employees with plant closure, discharge, and loss of benefits if they continued to support the Union. Respondent [Conair] also made numerous promises of increased or new benefits, solicited grievances, and made implied and explicit promises to remedy those grievances. In addition, Respondent [Conair] interrogated many of its employees about their union activities and created the impression that its employees' union activities were under surveillance. [*Id.* 119a-120a]

On April 11, 1977, the ILGWU, concerned over the number of employees who had expressed fear of being fired if they did not revoke their authorization to be represented by the union, commenced a strike to protest Conair's unlawful conduct; the strike engendered "substantial employee support" (*id.* 120a). "In response to the strike, [Conair] escalated its campaign of unfair labor practices" (*id.*). Specifically:

> Respondent [Conair] threatened to discharge strikers . . . because of their involvement in protected concerted activity. In addition, Respondent [Conair] repeated its threats of discharge and plant closure on a number of occasions during the course of the

> strike. Respondent [Conair] also interrogated employees about their union activities, and by interrogations, statements, and videotaping of the strike action, Respondent [Conair] created the impression that the employees' union activities were under surveillance. At the same time Respondent [Conair] offered increased benefits and better working conditions to nonstriking employees. When a number of strikers attempted to return to their jobs, Respondent [Conair] treated them as new employees and required them to sign papers waiving their Section 7 rights. The employees, however, refused to return to work under those unlawful conditions, and Respondent [Conair] again violated the Act by treating them as if they had abandoned their employment. [*Id.* 121a.]

In September, 1977, the strike ended and the strikers unconditionally requested reinstatement. In violation of law, Conair "instituted a discriminatory reinstatement policy," refusing reinstatement to some strikers and reinstating others as new employees with no seniority. (*Id.* 121a.)

In November, 1977, the NLRB conducted a representation election among Conair's employees. "As the election date neared, [Conair] intensified its unlawful activity." (*Id.* 122a.) Specifically:

> Respondent [Conair] continued to solicit grievances and implicitedly and explicitly promised to remedy those grievances. Respondent [Conair] also implemented better working conditions and made further promises of increased benefits. The number of its unlawful interrogations and threats also increased. For example, several weeks before the election, employees participating in Respondent[] [Conair's] profit-sharing plan were given a " 'Statement of Accounts' " with a message stamped on the front page which indicated that the profit sharing plan was not for union members. Finally, in an attempt not to leave anything to chance, posters and printed litera-

> ture indicating that union members would not receive a Christmas bonus and that if the Union won the election Respondent [Conair] would close the plant and move to Hong Kong were posted throughout the plant in work areas, the cafeteria, and hallways. [*Id.*]

Not surprisingly, the ILGWU was defeated in the representation election. Indeed, in contrast to its initial success in securing authorization cards in two weeks from 124 of the approximately 300 bargaining-unit employees, only 14 additional employees signed authorization cards thereafter. (ALJ op. at 8, 183 n.501.)

Proceedings Before the NLRB

The NLRB's General Counsel issued a consolidated complaint covering the ILGWU's six unfair labor practice charges. Hearings were held from March 23, 1978 to June 2, 1978, after which the ALJ issued an exhaustive opinion. The General Counsel, the ILGWU, and Conair all filed exceptions to portions of that decision.

On May 28, 1982, the NLRB issued its decision. The board found, in agreement with the ALJ, that Conair had "committed extensive unfair labor practices" which were "outrageous and pervasive." (App. 116a, 117a.) The board also found, again in agreement with the ALJ, that "those unfair labor practices . . . constituted objectionable conduct sufficient to warrant setting aside the election." (*Id.* 117a.) But the board concluded, contrary to the ALJ, that to remedy Conair's misdeeds it was appropriate to order Conair to bargain with the ILGWU.[2] In reaching this conclusion the board reasoned as follows:

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[2] The ALJ had understood the labor board's precedent as of the time he issued his decision to preclude the issuance of a bargaining order absent a card majority; it was for that reason that the ALJ denied such relief notwithstanding his finding that Conair's conduct had "render[ed] impossible a fair election." (ALJ op. at 184). As the board noted in its opinion, however, "[s]ubsequent to the

The NLRB first found, again in agreement with the ALJ's finding, that by its egregious misconduct Conair "has foreclosed any possibility of holding a fair representation election," and that no remedy, other than a bargaining order, could "effectively dissipate the lingering effects of [Conair's] massive and unrelenting coercive conduct." (*Id.* 124a-125a.) The board stressed "the extreme gravity of Respondent's violations" which "imparted in dramatic fashion the unmistakable message that loss of employment was the price to be exacted for the exercise of Section 7 rights" (*id.* 123a); the involvement of Conair's "highest executive officials" which "increas[ed] the likelihood that all employees would understand and credit any threats made" (*id.* 124a); the use of "mass communications . . . to insure maximum dissemination of unlawful threats" (*id.*); and the "timing of Respondent's unfair labor practices," including "swift and severe initial retaliation against the Union's organizational efforts, a lengthy campaign of unfair labor practices, an increase in violations as the election neared, and two unlawful discharges even after the election" (*id.*). The board therefore found, as a matter of fact, that "a fair and reliable election cannot be had." (*Id.* 117a.)

Having made that factual finding, the NLRB then considered the lawfulness of a bargaining order given that the ILGWU had obtained authorization cards from 46%, rather than a majority, of Conair's employees. The board concluded that a bargaining order is a lawful remedy in these circumstances:

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issuance of the Administrative Law Judge's decision in this case, the United States Court of Appeals for the Third Circuit . . . found that the Board possesses the authority to issue a nonmajority bargaining order in exceptional cases where a respondent's ' "outrageous" and "pervasive" ' unfair labor practices eliminated any reasonable possibility of holding a free and uncoerced election," and the board accepted the Third Circuit's decision. (App. 118a-119a, *citing United Dairy Farmers Cooperative Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980), discussed at pp. 14-16, *infra*.)

[A] remedial bargaining order is the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization. Anything short of a bargaining order would deny employees that right which has been the hallmark of national labor policy for nearly five decades.

* * * *

[W]e find that the risk of imposing a minority union on employees for an interim remedial bargaining period is greatly outweighed by the risk that, without a bargaining order, all employees would be indefinitely denied their statutory right to make a fair determination whether they desire union representation.[3] " 'There is, after all, nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a decertification petition.' "

Whether or not we order bargaining, the employees . . . will have lost their right to select a bargaining representative by virtue of the employer's unfair labor practices. . . . [A] remedial bargaining order . . . best vindicates the employees' right of self-determination. No other remedy will as quickly and effectively provide the opportunity for employee free choice which the Act mandates us to protect. [*Id.* 125a, 127a-128a; citations omitted]

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[3] The NLRB noted that "the risk of even temporarily contravening the wishes of an employee majority" was reduced in this case as there was "a reasonable basis . . . for concluding that the Union would have enjoyed majority support but for Respondent's unfair labor practices." (*Id.* 128a.) Recognizing that it could not "predict[] with total certainty the outcome of the Union's organizational campaign if Respondent had not repeatedly and illegally interfered," (*id.* 126a), the board deemed it significant that "approximately 46 percent of the employees had at one time openly expressed their support for the Union by signing authorization cards" and that "[e]ven after bearing the brunt of Respondent's misconduct for nearly 9 months, approximately one-third of participating voters still cast ballots for the Union." (*Id.* 128a.)

The Decision of the Court of Appeals

Conair sought review of the NLRB's decision in the United States Court of Appeals for the District of Columbia Circuit. By a divided vote, that court refused enforcement of the bargaining order.

The court began its analysis by identifying the factual predicate "underl[ying] the Board's remedial directives" —*viz*, the labor board's finding that "a fair election could not be held in the wake of Conair's 'outrageous' and 'pervasive' violations of the NLRA." (App. 32a-33a.) The court concluded that "[t]he evidence credited in the administrative proceedings, and prior NLRB and court decisions, support [that] determination[]." (*Id.* at 33a.) But the majority concluded that the bargaining order was outside of the Board's authority:

> Our national labor relations policy is designed to "effectuat[e] ascertainable employee free choice" and "expressed" majority sentiment. A non-majority bargaining order departs from this design. Absent a union election victory or some other concrete manifestation of majority assent to union representation, it is impossible to project the employees' choice reliably; imposition of a bargaining order in these circumstances runs a high risk of opposing the majority's will. [*Id.* 55a-56a (citations omitted)]

Judge Wald dissented, stating the essence of her disagreement with the majority as follows:

> To invoke the principle of majority rule as an absolute bar to a bargaining order in cases of extreme coercion like this introduces into the Act an unjustified premise that the employees' right to reject collective bargaining is more important than their right to choose it, a premise Congress clearly did not endorse. To leave untouched, perhaps permanently, the negative fallout of an employer's successful cam-

paign to wipe out organizational activity means that the employees are indefinitely presumed to have rejected the union even when they have been prevented from exercising their free choice. To permit a Board order as temporary surrogate for their right to select a union representative, on the other hand, appears a far less drastic alternative, and more in keeping with the congressional policy of encouraging free choice and collective bargaining. [*Id.* 90a-91a (citations omitted)]

REASONS FOR GRANTING THE WRIT

The National Labor Relations Act grants workers the right to bargain collectively with their employers and, to further the free collective bargaining system, the Act establishes an election process through which workers may decide—without employer interference, restraint, or coercion—whether to organize. In this case, while the union was seeking but had not yet secured expressions of support from a majority of the employees in the bargaining unit the employer commenced a campaign of "outrageous and pervasive" unfair labor practices that has precluded its employees from making a free and uncoerced choice as to whether they desire union representation. The question presented here is whether in these circumstances the NLRA precludes a remedial bargaining order.

That question has precipitated a classic case calling for this Court's consideration. No aspect of federal labor policy has been more discussed than the board's authority to issue a bargaining order in situations like the instant one.[4] The decision below, holding unlawful

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[4] *See, e.g.*, Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 132-40 (1964); Golub, *The Propriety of Issuing Gissel Bargaining Orders Where the Union Has Never Attained a Majority*, 29 Labor Law. J. 631 (1978); Hunter, *Conair: Minority Bargaining Orders Usher in 1984 at NLRB*, 33 Lab. L.J. 571

such bargaining orders, is inconsistent with this Court's decision in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The decision below squarely conflicts with the decision of the Third Circuit in *United Dairy Farmers Cooperative Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980). And the decision below places severe restrictions on the remedial authority of the NLRB—restrictions that disserve the policies of the Act. For all these reasons this petition for a writ of certiorari should be granted.

I. THE DECISION BELOW IS INCONSISTENT WITH THIS COURT'S DECISION IN *NLRB v. GISSEL PACKING CO.*

The question whether the NLRA precludes a bargaining order where, as a result of an employer's "outrageous and pervasive" violations of the law, employees have been denied the opportunity to make a free and uncoerced choice as to whether they desire union representation is not *res nova* in this Court. That question was addressed in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), this Court's seminal decision on the scope of the board's authority to order bargaining, and the decision below is inconsistent with this Court's decision in *Gissel*.

(a) In *Gissel* this Court set forth "the factors that go into . . . a determination" of when "bargaining orders [are] appropriately entered." (*Id.* at 613.) The Court began as follows:

> Despite our reversal of the Fourth Circuit below in Nos. 573 and 691 on all major issues, the actual area

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(1982); Ostan, *Bargaining Orders: Gissel and United Dairy Farmers Revisited*, 8 Employee Rel. L.J. 198 (1982); Comment, *United Dairy Farmers Cooperative Association: NLRB Bargaining Orders in the Absence of a Clear Showing of a Pro-Union Majority*, 80 Colum. L. Rev. 840 (1980); Comment, *Employer Pre-Election Coercion: A Suggested Approach for Effective Remedial Action*, 115 U. Pa. L. Rev. 1112 (1967); Case Comment, 49 Geo. Wash. L. Rev. 780 (1981).

> of disagreement between our position here and that of the Fourth Circuit is not large as a practical matter. While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order *without need of inquiry into majority status* on the basis of cards or otherwise, in *"exceptional" cases marked by "outrageous" and "pervasive" unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of "such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had."* [*Id.* at 613-614 (emphasis added; citations omitted)]

Having thus defined its common ground with the Fourth Circuit, the Court in the very next paragraph of its opinion turned to its "area of disagreement" with that court:

> The only effect of our holding here is to approve the Board's use of the bargaining order *in less extraordinary cases marked by less pervasive practices* which nonetheless still have the tendency to undermine majority strength and impede the election processes. The Board's authority to issue such an order *on a lesser showing of employer misconduct* is appropriate, we should reemphasize, where there is also a showing that at one point the union had a majority; *in such a case*, of course, effectuating ascertainable employee free choice becomes as important a goal as deterring employer misbehavior. [*Id.* at 614-15 (emphasis added)]

Gissel thus establishes that bargaining orders are appropriate in *two* categories of cases:

> *First*, where the employer has engaged in "'outrageous' and 'pervasive' unfair labor practices" which are "of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and

> reliable election cannot be had," a bargaining order is appropriate "*without need of inquiry into majority status*"; and
>
> *Second*, "in less extraordinary cases marked by less pervasive practices which nonetheless still have the tendency to undermine majority strength and impede the election processes," a bargaining order is warranted if the Board determines that "employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." [5]

(b) *Gissel* also rejects the very argument that the majority below embraced in overturning the board's bargaining order: that bargaining orders "needlessly prejudice[] employees § 7 rights" by denying an opportunity for self-determination through a board election. (*Id.* at 612.) The *Gissel* Court stated: "Such an argument ignores that a bargaining order is designed as much to remedy past election damage as it is to deter future misconduct." (*Id.*):

> It has been pointed out that employee rights are affected whether or not a bargaining order is entered, for those who desire representation may not be protected by an inadequate rerun election and those who oppose collective bargaining may be prejudiced by a bargaining order if in fact the union would have lost an election absent employer coercion. Any effect will be minimal at best, however, for there "is every reason for the union to negotiate a contract that will satisfy the majority, for the union will surely realize that it must win the support of the employees, in the face of a hostile employer, in order to survive the threat of a decertification election after a year has passed." [*Id.* at 612-13 n.33 (citations omitted)]

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[5] *Gissel* also teaches that bargaining orders are not appropriate in a third category of cases: those involving "minor or less extensive unfair labor practices which, because of their minimal impact on the election machinery, will not sustain a bargaining order." 395 U.S. at 615.

The Court also noted that "[t]here is . . . nothing permanent in a bargaining order, and if, after the effects of the employer's acts have worn off, the employees clearly desire to disavow the union, they can do so by filing a representation petition." (*Id.* at 613).[6]

(c) The court below acknowledged that *Gissel* "has been read to encompass cases with two characteristics: the employer's conduct falls into the most egregious category; the union's campaign at no point achieved a card majority." (App. 47a.) But the court of appeals dismissed the portion of *Gissel* that has been so read as merely "dictum, reciting Fourth Circuit dictum." (*Id.*)

Gissel cannot be so easily dismissed. To be sure, in each of the four cases decided by *Gissel* the union had at one time achieved a card majority. But the Court did not rely upon that fact in deciding all of those cases. Rather, in *Sinclair*, one of the consolidated cases, the Court stated:

> In *Sinclair*, No. 585, the Board made a finding, left undisturbed by the First Circuit, that the employer's threats of reprisal were so coercive that, even in the absence of a § 8(a)(5) violation, a bargaining order would have been necessary to repair the unlawful effect of those threats. *The Board therefore did not have to make the determination called for in the intermediate situation above that the risks that a fair rerun election might not be possible were too great to disregard the desires of the employees already expressed through the cards.* [*Id.* at 615 (emphasis added)]

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[6] In concluding that a bargaining order does not offend the principle of majority rule, *Gissel* reaffirmed this Court's earlier decisions in *Franks Bros. Co. v. Labor Board*, 321 U.S. 702 (1944), and *Labor Board v. Katz*, 369 U.S. 736 (1962), in which the Court enforced bargaining orders even though at the time each order was enforced the union no longer was supported by a majority of the bargaining unit. (*See also Labor Board v. Bradford Dyeing Ass'n*, 310 U.S. 318 (1940); *Labor Board v. P. Lorillard Co.*, 314 U.S. 512 (1942).)

Thus the Court upheld the bargaining order in *Sinclair* by reference to its delineation, earlier in the opinion, of the two categories of cases in which bargaining orders may issue, and specifically by classifying *Sinclair* as a "category one" case in which bargaining could be mandated without "mak[ing] the determination called for in the [category two] situation" concerning the relative reliability of an election as compared to the signing of authorization cards as a gauge of majority sentiment.

In sum, while the *Gissel* cases could perhaps have been decided on the narrow ground that the unions there had achieved majorities at one time, that was not this Court's ground of decision. The decision below in the instant case is thus inconsistent with *Gissel's ratio decidendi* and warrants review on that ground.

II. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE THIRD CIRCUIT IN *UNITED DAIRY FARMERS COOPERATIVE ASS'N v. NLRB.*

As the court below expressly acknowledged (App. 41a-42a), its decision in this case is in square conflict with the decision of the Third Circuit in *United Dairy Farmers Cooperative Ass'n v. NLRB*, 633 F.2d 1054 (3d Cir. 1980).[7] This conflict provides an independent reason, sufficient in itself, for granting a writ of certiorari here.

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[7] As the court below also acknowledged (App. 42a n.74), its decision is inconsistent with dictum in decisions of several other courts of appeals. *See NLRB v. Empire Corp.*, 518 F.2d 860, 863 n.3 (6th Cir. 1975) ("[i]t is clear that the board may, where it finds egregious unfair labor practices, enter a bargaining order even though the union is unable to demonstrate that it represents a majority"); *NLRB v. Montgomery Ward & Co., Inc.*, 554 F.2d 996, 1002 (10th Cir. 1977) (*Gissel* "holds that the Board can issue a bargaining order if, in its discretion, it finds the unfair labor practices were so 'pervasive' and 'outrageous' that a bargaining order is the only remedy"); *J.P. Stevens & Co. v. NLRB*, 441 F.2d 514, 519 (5th Cir. 1971), *cert. denied*, 404 U.S. 880 ("even where a union has never demonstrated majority support in an appropriate unit, the

United Dairy was brought to the Third Circuit on a petition to review an NLRB decision declining to issue a bargaining order to a union which had not obtained authorization cards from a majority of employees in the bargaining unit. Two members of the board, while acknowledging the board's authority to issue a "non-majority" bargaining order in appropriate circumstances, had concluded that such an order was not warranted on the particular facts of that case (242 N.L.R.B. at 1027-30); two other members had disagreed with that factual analysis and had voted to issue a bargaining order (*id.* at 1031-38); and the fifth board member, Member Penello, had voted against issuing a bargaining order because in his view the NLRA barred the board from issuing a bargaining order absent a showing of a card majority (*id.* at 1038-43).

The Third Circuit's decision reversing the board began by recognizing that

> The failure of the Board to issue a bargaining order was predicated on the view expressed in the opinion of Member Penello that it lacked the authority to do so in the absence of a card majority or election victory. Since the choice of remedies ordered by the Board is predicated on this legal conclusion, we must consider it in further detail. [633 F.2d at 1064-65]

After considering Member Penello's legal conclusion "in detail," the Third Circuit rejected that conclusion as erroneous:

> [W]e hold that the Board has the remedial authority to issue a bargaining order in the absence of a card majority and election victory if the employer has committed such "outrageous" and "pervasive" unfair labor practices that there is no reasonable possibility

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Board may issue a bargaining order where the employer's unfair labor practices are so 'outrageous' and 'pervasive' that their ' "coercive effects cannot be eliminated by the application of traditional remedies" ' ").

that a free and uncoerced election could be held. [*Id.* at 1069] [8]

Here, of course, the court below reached precisely the opposite conclusion on the same legal issue: "[W]e hold that Congress has not empowered the board to issue a bargaining order absent a concrete manifestation of majority employee assent to union representation; we therefore decline to enforce the NLRB's bargaining order." (App. 4a.) This conflict among the circuits should be resolved by this Court.

III. THE DECISION BELOW PLACES SEVERE RESTRICTIONS ON THE REMEDIAL AUTHORITY OF THE NLRB.

Under section 10(c) of the NLRA, if the NLRB finds an employer guilty of an unfair labor practice, the board "shall issue . . . an order . . . requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies of this subchapter." This "power to command affirmative action," the Court has said, "is to be exercised as a means of removing or avoiding the consequences of a violation where those consequences are of a kind to thwart the purposes of the Act." *Edison Co. v. Labor Board*, 305 U.S. 197, 236 (1938). And, as the Court added in *National Licorice Co. v. Labor Board*, 309 U.S. 350, 364 (1940), the board's "duty [under § 10(c)] extend[s] . . . to the prevention of [an employer's] enjoyment of any advantage which he has gained by violation of the Act."

In two respects, the decision below constricts § 10(c) as elaborated by this Court to the point that the Act's

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[8] Based on this holding, the Third Circuit remanded *United Dairy* to the board "to consider in the first instance whether the facts in this case rise to the outrageous and pervasive conduct which sanctions the issuance of such bargaining orders." 633 F.2d at 1069.

purposes are thwarted and the wrongdoer gains the very unlawful advantage he sought.

First, the decision below makes the board powerless to "remov[e] or avoid[] the consequences of a violation" (*Edison Co., supra*) in precisely those cases in which it is most critical to do so: cases in which the employer has engaged in a campaign of outrageous and pervasive unfair labor practices. For the appellate court's construction of § 10(c) precludes the one remedy which, in the board's words, provides "the only way to restore to employees their statutory right to make a free and uncoerced determination whether they wish to be represented in collective bargaining by a labor organization." (App. 125a.) "Such remedy simply allows the employees to learn through the only available route, the employer having unlawfully blocked the others, about the legitimate option the employer has foreclosed to them, so that after experiencing it for a reasonable time the employees then may make the free and reasoned choice the Act provides for them." (*United Dairy, supra*, 242 N.L.R.B. at 1038 (concurring opinion).)

Second, and equally important, the decision below makes it impossible for the NLRB to fulfill its "duty" to prevent an employer from "enjoy[ing] any advantage which he has gained by violation of the Act." (*National Licorice Co., supra.*) Under the court of appeals' interpretation of the Act, an employer which, through egregious wrongs, succeeds in denying its employees the right of free choice guaranteed by the Act is permitted to achieve its ultimate aim of avoiding collective bargaining. That decision thus invites employers to avoid bargaining by massive violations of the Act.

These profound consequences of the decision below provide a final ground, sufficient in itself, for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

MAX ZIMNY
1710 Broadway
New York, New York 10019

SIDNEY REITMAN
JESSE H. STRAUSS
BENNET D. ZUROFSKY
744 Broad Street
Newark, New Jersey 07102

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

Of Counsel:

DAVID SILBERMAN
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

Attorneys for Petitioner